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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 129

ADOLPH HOHENSEE, *Petitioner*,

v.

MARILYN FERGUSON, ET AL., *Respondents*

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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Printed by Action Printing Co., 518 5th St. N. W., Wash., D. C.

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Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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PETITION

Adolph Hohensee prays that writ of certiorari issue to review the Judgment of the Supreme Court of the Commonwealth of Pennsylvania entered in the above entitled case on February 5, 1959, denying petitioner's petition to reconsider his petition for reconsideration.

OPINIONS BELOW

No opinions have been handed down by any of the Courts below in this matter, notwithstanding repeated efforts by petitioner for same.

The Judgments and orders of the Courts below are appended hereto.

JURISDICTION

The time for filing petition for writ of certiorari in this Court was extended to and including the 5th day of June, 1959, by order of this Court dated June 5, 1959. The Judgment of the Supreme Court of Pennsylvania having been entered on February 5, 1959. The Jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Where a statute makes no provisions for a distinction among motions constituting the basis of appeal in the Common Pleas Court, and several motions were filed by petitioner in said Court, does it violate a substantive Federal right to quash an appeal taken from the denial of several of said motions, without a hearing, when such appeal presented the question relative to which of the several orders of the trial Court constituted the final order?

2. Where a Judgment is challenged on the ground of fraud, and such challenges are not denied by the adversary, and said Judgment denies petitioner a hearing on the merits, is the petitioner denied a substantive Federal right as a result thereof?

3. In dismissing the appeal which embraces 5 distinct orders of the trial Court, did the Supreme Court of Pennsylvania misconstrue and misapply the laws of Pennsylvania thereby denying to petitioner the equal protection of the law as guaranteed under the 14th amendment to the Federal Constitution?

4. Does the Judgment of the Supreme Court of Pennsylvania deny petitioner due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant and offended provisions of the 14th amendment to the Federal Constitution are as follows: ". . . nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The statute of the Commonwealth of Pennsylvania involved is 12 P. S. 1136, the Act of May 11, 1927, which provides in part as follows: "No appeal shall be allowed in any case from an order, Judgment or decree of any Court of Common Pleas or Orphans' Court, unless taken within three calendar months from the entry of the order, Judgment or decree appeal from . . ."

STATEMENT

Petitioner filed a libel action, pro Se, "against respondents in the Common Pleas Court of Allegheny County, Pennsylvania. That thereafter respondents filed preliminary objections to petitioner's amended complaint. These preliminary objections were set down for hearing at a time when petitioner was incarcerated in a Federal Penitentiary, at the United States Medical Center, Springfield, Mo.

The original date set for said hearing was February 13, 1958, to which petitioner protested because of his incarceration, his physical incapacity, and his inability, to both obtain or retain counsel to represent him. That the prominence of the defendants was an element which reacted against petitioner in his effort to obtain counsel.

The cause was continued to February 13, 1958, for hearing on the said preliminary objections, notwithstanding the registered objections of petitioner, who was continuously incarcerated until April 13, 1958, in the absence of petitioner, the matter was heard by the said Common Pleas Court. That the said hearing resulted in the dismissal of petitioner's amended complaint.

That in consequence of the foregoing and after the release of petitioner from confinement, he filed the following motions in the Common Pleas Court of Allegheny County, in the following sequence:

1. Motion to Strike-Off Judgment, filed on May 26, 1958, and denied on same day.

2. Motion to correct clerical error in record. Filed June 20, 1958, and denied June 20, 1958.

3. Motion to open judgment. Filed August 26, 1958, and denied August 26, 1958.

4. Motion to vacate judgment. Filed August 26, 1958, and denied August 26, 1958.

The motion to strike-off judgment referred to above was first granted by Judge Montgomery of said Court, and

thereafter on the same day denied by Judge Smart of said Court without notice or hearing to petitioner.

That thereafter, and on August 26, 1958, petitioner filed his appeal in the Supreme Court of Pennsylvania, Western District, from the foregoing Judgments and Orders of the Common Pleas Court for Allegheny County.

That upon the filing of said appeal in said Court the appellees filed their motions to dismiss the appeal on the ground that said appeal was filed out of time in violation of 12 P. S. 1136. That the Supreme Court of Pennsylvania, upon consideration of the several motions, dismissed the appeal of petitioner on September 30, 1958.

That thereafter petitioner filed in said Court his petition for reconsideration which was denied on October 30, 1958.

That thereafter petitioner sought to effect an appeal to this Court and in consequence thereof filed his designation of record in the Supreme Court of Pennsylvania, but was advised by the clerk of said Court that the records designated were never transmitted to the Supreme Court of Pennsylvania by the Common Pleas Court of Allegheny County. That thereupon petitioner filed in the Supreme Court of Pennsylvania his petition for reconsideration of the petition for reconsideration, in which he raised the question of denial of due process of law and the equal protection of the law under the 14th amendment to the Federal Constitution. Said petition was denied by said Court on February 5, 1959. It is from a denial of the order dated February 5, 1959. that this petition is filed.

HOW FEDERAL QUESTIONS WERE RAISED

Substantial Federal questions were raised in the Common Pleas Court of Allegheny County in the motions to correct clerical errors in record, entered June 20, 1958, and the motion to vacate Judgment, entered August 26, 1958.

An additional Federal question was raised in petitioner's petition for reconsideration filed in the Supreme Court of Pennsylvania.

REASONS FOR GRANTING THE WRIT

A. The Judgment entered on February 26, 1958, was procured through fraud.

Fraud is at the very inception of the judgment of the said Common Pleas Court entered on February 26, 1958.

1. Motion to vacate judgment filed and refused on August 26, 1958.

The motion to vacate judgment is verified and embraces, by reference, the grounds appearing in each of the other motions filed by the petitioner. Levelling fraud at the judgment entered on February 26, 1958, paragraph 2 of said motion to vacate judgment alleges, inter alia, as follows: "That said judgment was obtained by fraud practiced by defendants upon this Court and against plaintiff, the plaintiff was threatened at the request of defendants, by the authorities of the U. S. Penitentiary, Lewisburg, Pa., that if plaintiff did not dismiss all litigation of libel and conspiracy, then pending in the U. S. District Court for the Middle District of Pa. and the Court of Common Pleas for Allegheny County, including the instant case, that he would not get parole. Plaintiff refused to dismiss such suits and was thus denied parole. Following the foregoing threat, plaintiff was further threatened with insanity and death if he still refused to dismiss said cases. Plaintiff again refused to dismiss said cases and was thereupon assaulted and nearly battered to death, was confined to the hospital as a bed patient and remained there until the 24th day of November, 1957, when the U. S. Government authorities decided that his condition of barbaric and atrocious battering was so critical that they ordered his removal to the U. S. Government Medical Center at Springfield, Missouri, where he remained a bed patient in said hospital until April 13, 1958.

That the Common Pleas Court was well aware of the inability of the petitioner to appear for the hearing which was set for February 13, 1958. That not withstanding the incarceration and physical debility of petitioner the said

Court in his absence proceeded with the hearing and on February 26, 1958, entered an order dismissing petitioner's amended complaint.

2. MOTION TO STRIKE-OFF JUDGMENT:

In the motion to Strike-Off Judgment the following allegations appear: "Because it appears from the record that defendants caused the said argument to be heard on February 13, 1958, over plaintiff's objection and purposely to prejudice plaintiff fatally."

"Because it appears from the record that defendants knew that plaintiff could not be present on February 13, 1958."

3. MOTION TO CORRECT CLERICAL ERROR IN RECORD.

The motion to strike-off judgment with affidavit attached thereto, states in paragraph 3 thereof as follows: "Plaintiff has a right to have the records show what the Court did in plaintiff's case, and correction of the record of said judgment should be made to make the record speak the truth and to conform to the facts in the case." The foregoing allegations are uncontroverted. In an early case coming up from the State of Pennsylvania, this Court said fraud or collusion may be shown to avoid proceedings before any tribunal having jurisdiction. See, *Shelby* v. *Bacon*, 51 U. S. 56, 10 How. 56. In *Polis* v. *Russell*, 161 Pa. Super. 456, 55AA. 2d 558 (1947), the Court held that: "The Order of the Court below discharging the Rule to Strike-Off the Judgment was appealable (12 P. S. Sec. 1100), and this is true notwithstanding that defendant's rule to open the Judgment was made absolute at the same time the Rule to Strike-Off Judgment was discharged by the Court below. A void Judgment may be stricken at any time."

Again in the case of *Samango* v. *Hobbs, et al.*, 167 Pa. Super. 399, 75A. 2d 17 (1950), the Court said that no time limit is attached to a void Judgment, and it may be stricken-

off at any time. In *Johnson* v. *Royal Ins. Co.*, 218 Pa. 423, 425, 67A2d, 749, the High Court of Pennsylvania said: "It is well settled, and it needs no citation of authorities to sustain the proposition, that a Judgment can be set aside or stricken-off . . . on the ground of irregularity or invalidity appearing on the face of the record, and it is not confined to any particular kind of Judgments, nor limited as to the time it may be taken advantage of."

In the case of *Romberger, etc.* v. *Romberger, et al.*, 209 Pa. 454, 139A. 157, there was a similar holding by said Court, as follows: "The order was properly made, the right of a prothonotary to enter Judgment on a note is statutory and must be strictly construed. The Judgment was void on its face as there was no right to enter a judgment against two individuals upon a separate warrant of attorney executed by each. Moreover as a void judgment it could have been stricken-off at any time."

A. Cursory reading of the amended complaint of petitioner and the preliminary objections filed thereto will disclose the validity of the amended complaint and the lack of merit in the said preliminary objections.

The long uninterrupted line of Pennsylvania decisions holding that where a judgment is void it may be stricken-off at any time, is augmented by the following cases: *Pantall* v. *Dickey*, 123 Pa. 431, *Bryn Mawr* v. *James*, 152 Pa. 364, *Pasco Rural L. Co.* v. *Ronald, et al.*, 88 Pa. Super. 245, *H. S. Blatt Co.* v. *McCarthy*, 54 Pa. Super. 463, *Eddy* v. *Smiley*, 26 Pa. Super. 318, and *Agricultural T. Co.* v. *Brubaker*, 73 Pa. Super. 468.

B. The Judgment entered February 26, 1958, denies due process under Pennsylvania law, and contravenes the 14th amendment to the Federal Constitution.

The Commonwealth of Pennsylvania is free to regulate the procedure of its Courts in accordance with its own conception of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and

conscience of our people as to be ranked as fundamental. *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105. This is a salutary rule based on the necessity for the prompt, efficient and just dispatch of justice to all alike.

In the instant case, the maladministration of an act of the assembly and a rule of Court with respect thereto, involved a substantial Federal right as distinguished from a mere question of procedure.

An appeal was taken to the Supreme Court of Pennsylvania in reliance upon the act of May 11, 1927, 12 P. S. 1136. In construing this act the State Court has said, "the legislature did not require the appeal to be perfected within sixth (three) months but merely provided that it should be taken or entered within that period, leaving the time for perfecting indefinite. No exact limit of time can be fixed but counsel will be required to be prompt and no more than reasonable time for diligent action will be allowed." *Donley* v. *Semons*, 260 Pa. 88, 92, 93. The said statute does not attempt to define what constitutes final judgments or what judgments, orders or decrees may be considered final.

The judgments of the Appellate Court are without evidence to support them, because the circumstances under which the appeal was taken in the lower court were the compilation of a series of motions attacking the validity of an order of the trial court entered on February 26, 1958. *The Court has made an unwarranted assumption of fact.* It is a violation of due process for a state court to enter a judgment against petitioner without affording him a reasonable opportunity to be heard. *Saunders* v. *Shaw*, 244 U.S. 317, 319, 320. The Federal Court will review a judgment of a state court where a Federal right has been denied such as in the instant case where the petitioner was incarcerated in a U. S. Penitentiary and could not be present at the hearing. *Fiske* v. *Kansas*, 274 U.S. 380, 385.

By quashing this appeal, without oral argument, the Appellate Court joined the Common Pleas Court of Allegheny County in denying to petitioner that minimal require-

ment assured to every litigant under the Fourteenth Amendment. *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U.S. 79, *Brikerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 682. There can be no compromise on the footing of convenience or expediency because of a natural desire to be rid of embarrassing questions when that minimal requirement has been neglected or ignored. *Ohio Tel. Co.* v. *Comm.*, 301 U.S. 304, 305.

C. It is a violation of a substantive Federal right for a trial judge to overrule a fellow trial judge of the same court and refuse to permit the record to reflect such action.

The record shows that on May 26, 1958, petitioner's motion was granted to strike-off the judgment entered on February 26, 1958, by Judge Montgomery of the Common Pleas Court of Allegheny County.

That several days thereafter petitioner was advised by mail, by counsel for the adversary, that Judge Smart of said Common Pleas Court had signed an order on May 26, 1958, denying the very motion that Judge Montgomery had granted. The importance of the action of these two Judges is borne out by subsequent developments. The respondents have attempted to use Judge Smart's order of May 26, 1958, to show that one item of petitioner's appeal the judgment of February 26, 1958, was not filed in the Appellate Court within 3 calendar months as provided under the statute, 12 P. S. 1336. While on the other hand, Judge Montgomery's ruling granting the "Motion to Strike-Off Judgment" and stay all proceedings meanwhile tolled the said 3 months statute, especially since the judgment entered February 26, 1958, was appealable on May 26, 1958.

Petitioner upon being informed of Judge Smart's action by counsel for the adversary, as aforesaid, sought to correct this situation by filing his "Motion to Correct Clerical Error In Record". The Court refused said motion on June 20, 1958. Thus the Common Pleas Court has denied to petitioner substantial rights which constitute a denial of due

process of law. The failure of the Court to make the correction has resulted in an injustice arising from an act of the Court, since May 26, 1958, was within the time allotted for appeal as aforesaid.

Due process of law required a correction of the record to show what the Court did in petitioner's case and to make the record speak the truth and conform to the facts in the case. The phrase "due process of law" antedates the establishment of our institutions. It embodies one of the broadest and most far reaching guaranties of personal and property rights. It is necessary for the enjoyment of life, liberty and property that the constitutional guaranty be strictly complied with as emphasized in the case of *Frank* v. *Mangum*, 237 U.S. 309, *Holden* v. *Hardy*, 169 U.S. 366, and *Hurtado* v. *California*, 110 U.S. 516, 535, and quoted thus:

"It has never been doubted by this Court, that notice and hearing are preliminary steps essential to the passing of an enforcible Judgment, and that they, together with a legally competent tribunal, having jurisdiction of the case, constitute basic elements of constitutional requirement of due process of law." *Powell* v. *Alabama*, 287 U.S. 45, 68.

In *Holden* v. *Hardy*, *supra*, it was held that the necessity of due notice and an opportunity of being heard was described as among the "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard." Trial Judge Smart in the Common Pleas Court not only denied petitioner due process of law when he overrode Judge Montgomery, but also denied him his substantial State and Federal right when the said Judge refused to correct the record in order that the record might correctly show his action and the action of Judge Montgomery, and that the record might be permitted to speak the truth.

Mr. Justice Fields in the early case of *Galpin* v. *Page*, 18 Wall. 350, 368, 369, 85 U.S. 350, 368, 369, said that the rule, that no one should be personally bound until he has had his day in Court, was as old as the law, and it meant that

one must be cited to appear and afforded an opportunity to be heard; that: "Judgment without such citation and opportunity is void of all the attributes of a judicial determination; it is judicial usurpation and oppression, never can be upheld where justice is justly administered." What then does a hearing include? Historically and in practice, in our land, it has always included the right to appear personally or through counsel. The right to be heard would be of no avail if it were devoid of these attributes. It was to no avail to petitioner that respondents were able to set their preliminary objections down for hearing on February 13, 1958, at a time that respondents knew petitioner was incarcerated in a Federal penitentiary and could not be present personally. Respondents also knew that petitioner would not be represented by counsel because of the prominence of respondents. Counsel were reluctant to oppose them because of such prominence. The instant appeal and the facts preceding it in the Common Pleas Court resemble greatly the situation which developed in *Alcorta* v. *Texas*, (1957), 355 U.S. 28. There this Court held that the petitioner was denied due process of law when the prosecution permitted its own witness to commit perjury on the witness stand in order to obtain a conviction against petitioner. This court in commenting on the perjured testimony of Castilleja said that: "under the general principle laid down by this Court in *Mooney* v. *Holohan*, 294 U.S. 103, and *Pyle* v. *Kansas*, 317 U.S. 213, petitioner was not accorded due process of law. It cannot seriously be disputed that Castilleja's wife was, nothing more than that of casual friendship. This testimony was elicited by the prosecutor, who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of sudden passion in which he killed his wife. If Castillejas' relationship with petitioner's wife had been truthfully portrayed to the jury it would have, apart from impeaching

his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja."

It is a like analogy that the action of Judge Smart of the Common Pleas Court is highly prejudicial in the petitioner because he overruled his fellow judge without affording petitioner a hearing and he refused to correct the record so as to disclose his true action.

D. Judgment of Supreme Court of Pa. denies petitioner the equal protection of the law as applied in Pa. and denounced under the Fourteenth Amendment.

Respondents, through their motion in the Supreme Court of Pennsylvania to quash the appeal in said court, contended that in the Common Pleas Court the appeal was not timely prosecuted, and in consequence thereof the said Appellate Court was without jurisdiction to entertain the appeal. This contention assumed that there was but one appealable judgment, and that judgment was entered on February 26, 1958. This argument rejected the judgments of the Common Pleas Court entered on May 26, 1958, June 20, 1958, and August 26, 1958.

It is the position of the petitioner that the judgment of the Common Pleas Court entered February 26, 1958, was not the only appealable judgment in the proceedings in the trial court. That each of the subsequent judgments entered was equally appealable.

The untenable action of Judge Smart having the effect of overruling a previous order of Judge Montgomery, in which the latter had granted a rule to show cause why the judgment entered on February 26, 1958, should not be stricken-off, and staying the operation of said judgment in the meanwhile, denied to petitioner the equal protection of the law as applied to litigants of Pa. and guaranteed under the 14th Amendment to the Federal Constitution.

During the court proceeding the said action of Judge Montgomery had tolled the operation of the Pa. statute (12 P.S. 1136).

Consequently the judgment that the court entered on February 26, 1958, became inoperative and devoid of any finality.

A Court has plenary power while the term is in existence to modify or vacate its judgment and the action of Judge Montgomery was within this rule. *Zimmerin* v. *United States*, 298 U.S. 167, 169, 170. In the instant case if the action of Judge Montgomery had not been interferred with by Judge Smart, the said rule to show cause, and stay of Judgment, would have been entered on May 26, 1958, and would plainly have governed, on the issue of time, for filing the appeal in the Appellate Court. It has been held by this Court that where the date of entry of a final decree is in doubt the decrees may be examined to determine the intention of the courts as to the act constituting its final judgment. *United States* v. *Hark*, 320 U.S. 531, 535. Here, as in the *Hark* case, it is not to be assumed that the Court's entries of judgments of May 26, June 20, and August 26, 1958, were intended to be empty forms. If the judgment of February 26, 1958, is to stand as the final judgment, in the light of the foregoing developments, then the provisions under the Pa. Civil Procedure rules are but empty gestures. See, *Union Guardian Trust Co.* v. *Jastromb*, 6 Cir. 47 F. 2d 689. And the filing of subsequent motions are ineffectual. The fact that the Common Pleas Court acted upon each of the motions filed by petitioner is in itself sufficient to make the August 26, 1958, order of said court its final order.

It is well settled by decisions of this Court that, "where a petition for rehearing, a motion for a new trial, or a motion to vacate, amend or modify a judgment is seasonably made and entertained, the time for appeal does not begin to run until the disposition of the motion." *Letshman* v. *Associated Electric Co.*, 318 U.S. 203, 205; and *U. S.* v. *Crescent Amusement Co.*, 323 U.S. 173, 177. Likewise this court has held that an untimely petition for a rehearing or to amend a judgment, if entertained or considered on its

merits, has the same effect of a timely petition. *Bowman* v. *Loperena*, 311 U.S. 262, 266, and cases cited; compare *P. Fister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 150. In these circumstances, "the judgment of the court as originally entered does not become final" until the action of the court on such petition, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, *supra*. In the Bowman case and each of the three cases it cited, the ultimate petition for rehearing, although considered by the lower court, was denied. The problem presented in those cases was therefore more difficult than that raised here. The problems are parallel to the extent that the efforts to change the judgment were unsuccessful.

Indeed, the general rule in this county is: "that where a judgment, order, or decree is amended or modified the time within which an appeal from such determination may be taken begins to run from the date of the amendment or modification." See, Annotation, 80 L. ed. 1121, and *Memphis* v. *Brown*, 94 U.S. 715. An afortiori, since the order of Judge Montgomery of May 26, 1958, stayed the judgment of February 26, 1958, the time could not have begun to run before May 26, 1958.

If the original judgment is effected or stayed by a subsequent order or judgment, the time for appeal is extended with respect to all of its provisions. If the question were open, wise judicial policy would dictate such a result. But the question is not open, although there seems to have been so little doubt about it that the answers have been assumed without explanation. Thus in *U. S.* v. *Crescent Amusement Co.*, 323 U.S. 173, 177, the plaintiff's time to appeal was held to be extended by the defendant's motion to amend the findings, although the amendments to the findings did not relate to the portion of the judgment from which the plaintiff was appealing.

In *Memphis* v. *Brown*, 94 U.S. 715, 718, this Court said: "The form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as for

that date. This the Court had a right to do during the term and for the very purpose of giving it effect for a supersedeas."

In *Union Guardian Trust Co.* v. *Jastromb*, 47 F. 2d 689, the 6th Circuit Court said: "The order of March 18 does not expressly vacate the order of March 7, but we think it should be considered as having that effect. It covered exactly the same subject matter, and there could have been no object in entering it, unless it was intended to supersede the earlier order."

The order of Judge Montgomery, dated May 26, 1958, staying the judgment of February 26, 1958, comes within the meaning of the for going cases. Similarly, in *Johnson* v. *Eisentranger*, 339 U.S. 763, the Government's petition for certiorari was filed within 90 days of the denial of respondent's petition for rehearing below, not within 90 days of the original order.

Speaking of subsequent orders of the Court, this Court in the case of *Rubber Co.* v. *Goodyear*, 6 Wall. 153, 73 U.S. 153, observed that an order had been entered on the Court's minutes on November 28. On December 5, the Court entered another order, captioned "Final Decree" which was for the most part in the very language of the earlier order and which made no change of substance in that order. This Court then held that an appeal taken from the December order was timely because the latter order was the final order in the cause. This Court further stated at pp. 155-156 that: "We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the Court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court apparent on the face of the proceeding. We must hold, therefore, the decree of December the 5th to be the final decree."

It may be noted from the record that on May 26, 1958, petitioner filed his "Motion to Strike-Off Judgment," entered on February 26, 1958. That on said occasion, peti-

tioner requested Judge Smart, in his chambers, to act on said "Motion to Strike-Off Judgment" and the "Rule to Show Cause" in conjunction therewith, which Judge Smart declined to do, referring petitioner to the motion's Court, then presided over by Judge Montgomery. Thereupon petitioner presented said motion in open court, and Judge Montgomery granted the "Rule to Show Cause," and stayed all proceedings in meanwhile requested therein. Petitioner was taken by surprise when several days thereafter he received in the mail a notice from counsel for the adversary that Judge Smart had entered an order on May 26, 1958, refusing petitioner's motion to strike-off judgment. Moreover, the said refusal of Judge Smart to strike-off judgment was determined without notice or hearing to petitioner. The aforesaid "Star Chamber" ruling of Judge Smart was not only prejudicial to petitioner but equally violative of the rules of the Common Pleas Court. The further question proposed is the propriety of one Common Pleas judge overruling the action of another Common Pleas judge involving the same subject matter and pleading.

The Supreme Court of Pennsylvania has held, as far back as 1889, that where a motion to Strike-Off Judgment challenges the validity of a judgment and characterizes it as void, the time for taking an appeal begins to run from the date of the denial, or granting of the motion to strike-off judgment. *Clarion, etc.* v. *Hamilton,* 127 Pa. I, 17AA. 752.

It was held in the case of In re: Crescent Township Road, (1901), 18 Pa. Super. 160, that the time within which a party may appeal from the refusal to Strike-Off or quash a decree or order, void on its face, does not begin to run until the ruling on said motion.

The foregoing decisions, coupled with the ruling of Common Pleas Judge Smart, clearly demonstrate the denial, to petitioner, of the equal protection of the law clause, under the Fourteenth Amendment to the Federal Constitution.

See, Missouri Ex. Rel., *Gaines v. Canada*, 305 U.S. 337, 344, 345; *McCable* v. *Atchinsin, etc.*, 235 U.S. 151, 160, 162; and *Mitchel* v. *United States*, 313 U.S. 80.

The undisputed facts appearing in the instant record show, conclusively, the circumstances underlying the ruling of Judge Smart. The denial to this petitioner, his constitutional right to be heard on his motion to Strike-Off Judgment, is an invasion of a fundamental right protected by the Fourteenth Amendment.

And in view of the nature of the right denied, and the method used in consummating the denial, it is evident that the constitutional policy adopted by the Court has been invaded.

E. It is apparent upon the face of the record that the judgment entered February 26, 1958, is void.

The amended complaint filed by petitioner in the Common Pleas Court of Allegheny County, Pa., complies with the rules of pleadings under the Pennsylvania law in every respect.

All of the decisions of the Pennsylvania courts support the validity of the amended complaint. Petitioner's motion to Strike-Off Judgment presented to the trial court the following basic objections: (a) Denial of the right to be heard, (b) fraud, and (c) the validity of the amended complaint.

The amended complaint was challenged by preliminary objections. The record discloses that these preliminary objections were without substance and should have been overruled. These errors are apparent upon the face of the record, in which the Judgment of February 26, 1958, is entered.

The law is well settled in Pennsylvania that where a motion to Strike-Off Judgment is directed to errors appearing on the record, and such motion is denied, the time for taking an appeal begins to run from the refusal of the motion to STRIKE-OFF JUDGMENT. Thus in the case of

Gedrick v. *Yaroscz, et al.*, (1931), 102 Pa. Super. 127, 156A. 575, the facts showed that on May 31, 1929, plaintiff caused writs of scire facias to be issued in the Court below on two mechanics' liens which he had filed against two pieces of property belonging to defendants. Defendants filed affidavits of defense, and plaintiff entered in each case a rule for judgment for want of a sufficient affidavit of defense. After arguments on the rule, the court below on November 1, 1929, filed an opinion and entered an order thereon giving judgment for want of sufficient affidavit of defense, and granting leave to defendant to file supplemental affidavit of defense within 15 days. On November 29, 1929, when no supplemental affidavit had been filed, plaintiff's attorney filed with the prothonotary praecipes for judgments as per order of court, and judgments were accordingly entered. On April 19, 1930, defendants filed supplemental affidavits of defense, and on April 21, 1930, they filed motions to Striffe-Off and Open Up judgments entered on November 29, 1929. On June 18, 1930, the Court denied the motions, and discharged the rule, and approved the entry of Judgments of November 29, 1929. Defendants appealed from the Order of Court dated June 18, 1930, denying their motions and discharging their rules. Appellees thereupon moved to Quash the appeal on the ground that they were not taken within three months from the entry of Judgment of November 29, 1929. The Court held that: "If the appeals had been taken from these Judgments (Judgments of November 29, 1929), they would have been too late. But as the appeal which are sanctioned by the act of May 20, 1891, P. L. 101 (12 U.S. 3110, 1164), were taken from the orders, refusing to Strike-Off, and To Open those Judgments, they were in time. It follows that the motion to quash the appeal must be dismissed."

CONCLUSION

For the reasons stated herein above it is respectfully submitted that the petition for Writ of Certiorari should be granted.

JAMES C. NEWTON
1934 Eighth St., N.W.
Washington, D. C.
Counsel for Petitioner

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

No. 3

MARCH TERM, 1959

ADOLPH HOHENSEE, *Appellant*

v.

MARILYN FERGUSON

Appeal from the judgments of the Court of Common Pleas of the County of Allegheny

---

No. 1737 July Term, 1957

Certified from the Record

January 30, 1959, Petition for Reconsideration of Petition for Reconsideration filed.

ORDER

February 5, 1959, petition dismissed by the Court,

JONES, *Chief Justice*

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of said Court at Pittsburgh, Pa. this 30th day of April 1959.

PATRICK N. BALSINGER
Prothonotary

No. 3 March Term, 1959

SUPREME COURT

ADOLPH HOHENSEE, *Appellant*

v.

MARILYN FERGUSON

CERTIFIED COPY OF RECORD

CERTIFIED COPY OF ORDER

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*

v.

MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO STRIKE OFF JUDGMENT

ORDER

May 26, 1958, the within motion refused.

BY THE COURT
SMART, J.

Certified to be a true and complete copy of original.

ADOLPH HOHENSEE

Filed May 26, 1:11 P.M., 1958.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
v.
MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO CORRECT CLERICAL ERROR IN RECORD

Now comes plaintiff in the above-entitled cause and moves the court to correct the clerical error in the record of its judgment of May 26, 1958, which should show that the "Motion to Strike Off Judgment" received in this court on May 26, 1958, was granted, instead of "refused," and for the entry of such correction nunc pro tunc, and for such other relief which to this court may seem just and proper, for the following reasons:

1. Failure to make the correction nunc pro tunc would result in injustice arising from an act of the court, since May 26, 1958, was within the time allotted for appeal, and to make such motion.

2. Judgment nunc pro tunc would simply consummate what the court adjudged but imperfectly performed.

3. Plaintiff has a right to have the records show what the court did in plaintiff's case, and correction of the record of said judgment should be made to make the record speak the truth, and to conform to the facts in the case.

4. In the case of an error by the clerk, it is declared that the action of the court should not be permitted to be falsified by a failure of a ministerial officer to perform his duty.

5. Affidavit is attached to help the court to recall the facts herein.

ADOLPH HOHENSEE, *pro se*
P.O. Box 910
Scranton, Pa.

Date:

June 20, 1958. Order of Court.
June 20, 1958. Motion Refused.

DUFF, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
v.
MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO VACATE JUDGMENT

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
v.
MARILYN FERGUSON, *Defendant*

No. 1737 July Term, 1957

Trespass

MOTION TO OPEN JUDGMENT

Filed: August 26, 9:24 A.M. 1958.

Subscribed and sworn to before me this 11th day of August, 1958.

My commission expires Jan. 1, 1962.

ED. W. GAUKONDER, SEAL
Alderman
23rd Ward, Scranton, Pa.

August 26, 1958.

Motions to vacate judgments refused.

BY THE COURT
O'BRIEN, J.

Eo die, exception noted to plaintiff.

HENRY X. O'BRIEN, J.

Filed August 26, 9:26 A.M. 1958.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

ADOLPH HOHENSEE, *Plaintiff*
P.O. Box 910, Scranton, Penna.

v.

MARILYN FERGUSON, *Defendant*
c/o Hearst Pub. Co., Inc., Telegraph Square, Pittsburgh, Pa.

No. 1737 July Term, 1957

Trespass

Before SMART, NIXON and LEWIS, JJ.

ORDER

And Now, to-wit, February 26, 1958, the above entitled matter having come on for argument on February 13, 1958, on the preliminary objections of defendant, pursuant to the order of Court of December 19, 1957, filed at No. 1739 July Term, 1957, and the Court having been advised by telephone at 9:30 A.M. on February 13, 1958, by the brother of plaintiff that plaintiff had received notice of this argument and requested a further continuance of the argument, which was refused for the reason that this case had already been continued several times as set forth in the memorandum opinion of December 19, 1957, filed at No. 1739 July Term, 1957, which by reference is made part hereof; that neither plaintiff nor a representative of plaintiff appeared, and the Court having heard arguments on behalf of the above defendant on the preliminary objections filed by defendant, after consideration thereof and of the briefs submitted in support thereof, it is hereby ordered that the respecti preliminary objections filed by defendant above named be and the same are hereby sustained, and the plaintiff's complaint and amended complaint be and the same are hereby dismissed at the costs of the plaintiff.

By the Court
Walter P. Smart
Clarence B. Nixon
Lobar L. Lewis

So die, exception noted to plaintiff and bill sealed.

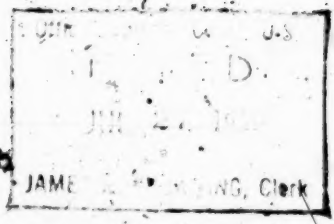
Walter P. Smart, *Judge*

Filed Feb. 26, 1958, 11:05 A.M.

From the Record
David B. Roberts
Prothonotary
By Louis W. Sauers, *Deputy*

EXHIBIT "A"

FILE COPY



IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 129

ADOLPH HOHENSEE, Petitioner

v.

MARILYN FERGUSON, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. S. MOORHEAD, JR.
DAVID W. CRAIG
MOORHEAD & KNOX
Counsel for Respondent

1732 Oliver Building
Pittsburgh 22, Pennsylvania

SMITH BROS. CO., INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.